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**PILECON REALTY SDN BHD**

**v.**

**PUBLIC BANK BHD & ORS AND OTHER APPEALS**

B

FEDERAL COURT, PUTRAJAYA  
ZULKEFLI MAKINUDIN CJ (MALAYA)  
ABDULL HAMID EMBONG FCJ  
AHMAD MAAROP FCJ  
ZALEHA ZAHARI FCJ

C

SULONG MATJERAIE FCJ  
[CIVIL APPEALS NO: 02-71-11-2011, 02-72-11-2011(W),  
02-73-11-2011 & 02-74-11-2011(W)]  
18 JANUARY 2013

D

***BANKRUPTCY:*** Interest - Interest on debt - Winding up of company  
- Whether interest payable to bank ceased to accrue after date company  
was wound up - Whether security not realised within six months of  
winding up order - Whether bank failed to meet statutory limit of six  
months under s. 8(2A) Bankruptcy Act 1967

E

***COMPANY LAW:*** Winding up - Disposition of property - Proceeds of  
sale of property utilised for payment of redemption sum to bank and  
balance to other creditors - Whether interest payable to bank ceased to  
accrue after date company was wound up - Whether s. 8(2A)  
Bankruptcy Act 1967 applicable to secured creditors in winding up

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situation - Whether bank failed to meet statutory limit of six months  
under s. 8(2A) Bankruptcy Act 1967 - Whether bank entitled to any  
interest - Civil Law Act 1956, s. 4(1) & (2) - Companies Act 1965,  
s. 291(1) & (2)

G

***STATUTORY INTERPRETATION:*** Interpretation of acts - Intention  
of legislature - Bankruptcy Act 1967, s. 8(2A) - Whether applicable to  
secured creditors in winding up situation - Whether secured creditor given  
timeline of six months failing which they are not entitled to interest

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Public Bank Bhd ('the bank') granted a banking facility to  
Transbay Ventures Sdn Bhd ("Transbay") and the facility was  
secured by a charge over a piece of land ('the said property')  
belonging to Transbay in favour of the bank. Transbay defaulted  
in repayment of the said loan, and thus the bank instituted a suit  
in the High Court against Transbay to recover the sums  
outstanding. Judgment was entered against Transbay and Transbay  
was subsequently wound up. A sale and purchase agreement  
(‘SPA’) was then executed between the appointed liquidators of

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the company and one BSEL Waterfront regarding the said property ('the SPA'). Clause 6 of the SPA expressly provides that the proceeds of the sale of the said property would be utilised for payment of the redemption sum to the bank, and the balance for distribution to other creditors of Transbay pursuant to s. 292 of the Companies Act 1965. The liquidators then requested the bank to furnish a statement of the redemption sum to enable the charge in favour of the bank, to be discharged. The bank's position was that, as long as its security had not been realised, it was entitled to charge interest at the default rate as prescribed in the loan agreement. An unsecured creditor to whom Transbay was indebted, Pilecon Realty, applied for directions of the court and relied on ss. 40(3) and 43(6) of the Bankruptcy Act 1967 to support their contention that the interest payable to the bank ceased to accrue after the date Transbay was wound up. The decision of the High Court in extending the interest beyond the six month limit prescribed in s. 8(2A) of the Bankruptcy Act 1967 was set aside by the Court of Appeal on grounds that the High Court had erred. The bank herein obtained leave to appeal to the Federal Court against the decision of the Court of Appeal on the following questions of law, (i) whether the statutory right of a chargee under the National Land Code to rely on his security to obtain full satisfaction of the indebtedness owed to him was restricted by s. 8(2A) of the Bankruptcy Act 1967 where such security was provided by a company which was later wound up under the provisions of the Companies Act 1965; and the security was not realised within six months of the winding up order; and (ii) whether s. 8(2A) of the Bankruptcy Act 1967 applies in a company liquidation situation where the secured creditor relied on his security for full satisfaction. Pilecon Realty also obtained leave to cross appeal to the Federal Court against part of the decision of the Court of Appeal on the following question of law, which was: whether a secured creditor was entitled to any interest in respect of its debts after the making of a winding up order if it did not realise its security within six months from the winding up order.

**Held (dismissing bank's appeals; allowing Pilecon Realty's cross appeals)**

**Per Zaleha Zahari delivering the judgment of the court:**

- (1) Section 8(2A) of the Bankruptcy Act 1967 is clear and unambiguous. In the absence of an express provision limiting its application, there is no reason to limit its application only

- A against a bankrupt and not to a wound up debtor. Upon a true construction of s. 4(1) and (2) of the Civil Law Act 1956, s. 291(1) and (2) of the Companies Act 1965 and s. 8(2A) of the Bankruptcy Act 1967, the computation of interest was for a maximum period of six months as stated in s. 8(2A).
- B Section 8(2A) was also equally applicable to a secured creditor in relation to a winding up situation. The answers to the first and second questions posed were therefore in the affirmative. (para 46)
- C (2) Based on the reading of s. 8(2A) of the Bankruptcy Act 1967, a secured creditor is given a timeline of six months to sell the charged property failing which they are not entitled to interest. Since the charged property in this case was realised some two years and six months after the winding up of Transbay, the bank had failed to meet the statutory limit of six months under s. 8(2A) of the Bankruptcy Act 1967. As such, the bank should not be entitled to any interest. The question posed by Pilecon Realty was thus answered in the negative. (para 49)
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***Bahasa Malaysia Translation Of Headnotes***

- E Public Bank Berhad ('bank') telah memberikan kemudahan perbankan kepada Transbay Ventures Sdn Bhd ("Transbay") dan kemudahan tersebut telah dijamin oleh gadaian sebidang hartanah ('hartanah tersebut') milik Transbay yang memihak kepada bank.
- F Transbay ingkar dalam pembayaran semula pinjaman tersebut, oleh itu, bank telah memulakan saman di Mahkamah Tinggi terhadap Transbay untuk mendapatkan jumlah tertunggak. Penghakiman telah dimasukkan terhadap Transbay dan Transbay kemudiannya digulung. Satu perjanjian jual beli ('PJB') telah dimeterai antara
- G pelikuidasi-pelikuidasi yang dilantik syarikat dan satu BSEL Waterfront mengenai hartanah tersebut. Klausula 6 PJB dengan jelasnya menyatakan bahawa hasil jualan hartanah tersebut akan digunakan untuk pembayaran jumlah gadaian kepada bank, dan bakinya akan diagihkan kepada pemiutang-pemiutang lain menurut s. 292 Akta Syarikat 1965. Pelikuidasi-pelikuidasi kemudiannya meminta bank mengemukakan jumlah penyata gadaian untuk membolehkan gadaian yang berpihak kepada bank dilepaskan. Kedudukan bank adalah bahawa, selagi sekuriti tidak dimanfaatkan, ia berhak untuk mengenakan faedah pada kadar ketika kemungkiran
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seperti yang ditetapkan dalam perjanjian pinjaman. Satu pemiutang bercagar yang mana Transbay terhutang, Pilecon Realty, memohon arahan mahkamah dan merujuk kepada ss. 40(3) dan 43(6) Akta Kebankrapan 1967 untuk menyokong hujahannya bahawa faedah yang perlu dibayar kepada bank berhenti terakru selepas tarikh Transbay digulung. Keputusan Mahkamah Tinggi yang telah melanjutkan faedah melebihi had enam bulan yang ditetapkan dalam s. 8(2A) Akta Kebankrapan 1967 telah diketepikan oleh Mahkamah Rayuan atas alasan bahawa Mahkamah Tinggi telah khilaf. Seterusnya bank memperolehi kebenaran untuk membuat rayuan kepada Mahkamah Persekutuan terhadap keseluruhan keputusan Mahkamah Rayuan atas dasar persoalan-persoalan undang-undang (i) sama ada hak statutori pemegang gadaian di bawah Kanun Tanah Negara untuk bergantung kepada sekuritinya bagi memperolehi pembayaran penuh hutang yang terhutang kepadanya dihadkan oleh s. 8(2A) Akta Kebankrapan 1967 di mana sekuriti tersebut telah disediakan oleh syarikat yang kemudiannya digulung di bawah peruntukan-peruntukan Akta Syarikat 1965; dan sekuriti tidak dimanfaatkan dalam tempoh enam bulan dari tarikh penggulungan dan (ii) sama ada s. 8(2A) Akta Kebankrapan 1967 terpakai dalam keadaan pembubaran syarikat di mana pemiutang bercagar bergantung kepada sekuritinya untuk pembayaran penuh. Pilecon Realty juga memperolehi kebenaran untuk rayuan balas kepada Mahkamah Persekutuan terhadap sebahagian keputusan Mahkamah Rayuan atas persoalan undang-undang iaitu: sama ada pemiutang bercagar berhak ke atas apa-apa faedah berhubungan hutang-hutang selepas suatu perintah penggulungan dibuat jika ia tidak memanfaatkan sekuritinya dalam tempoh enam bulan daripada perintah penggulungan.

**Diputuskan (menolak rayuan bank; membenarkan rayuan balas Pilecon Realty)**

**Oleh Zaleha Zahari menyampaikan penghakiman mahkamah:**

- (1) Seksyen 8(2A) Akta Kebankrapan 1967 adalah terang dan jelas. Dalam ketiadaan peruntukan nyata yang menghadkan penggunaannya, tiada sebab untuk menghadkan penggunaannya hanya terhadap seorang bankrap dan bukan kepada penghutang digulung. Mengikut tafsiran sebenar s. 4(1) dan (2) Akta Undang-Undang Sivil 1956, s. 291(1) dan (2) Akta Syarikat 1965 dan s. 8(2A) Akta Kebankrapan 1967,

- A pengiraan faedah adalah untuk tempoh maksimum enam bulan seperti yang dinyatakan dalam s. 8(2A). Seksyen 8(2A) juga sama terpakai kepada pemiutang bercagar berhubung dengan keadaan penggulangan. Jawapan-jawapan kepada soalan pertama dan kedua oleh itu adalah dijawab secara afirmatif.
- B (2) Berdasarkan bacaan s. 8(2A) Akta Kebankrapan 1967, pemiutang bercagar diberi tempoh masa enam bulan untuk menjual hartanah dalam gadaian dan jika gagal, mereka tidak berhak untuk mendapat sebarang faedah. Oleh kerana
- C hartanah dalam gadaian dalam kes ini hanya dimanfaatkan dua tahun enam bulan selepas penggulangan Transbay, bank telah gagal memenuhi had masa statutori enam bulan di bawah s. 8(2A) Akta Kebankrapan 1967. Dengan itu, bank tidak berhak mendapat sebarang faedah. Persoalan yang dibangkitkan
- D oleh Pilecon Realty dijawab secara negatif.

**Case(s) referred to:**

*Majlis Amanah Ra'ayat v. The Official Receiver, Malaysia [1984] 1 CLJ 76; [1984] 1 CLJ (Rep) 240 FC (refd)*

**E Legislation referred to:**

Bankruptcy Act 1967, ss. 8(1), (2), (2A), 40(3), 42, 43(4), (5), (6), para 9 Sch C  
Civil Law Act 1956, s. 4(1), (2),  
Companies Act 1965, ss. 237(3), 291(1), (2), 292

- F (Civil Appeals No: 02-71-11-2011(W) & 02-72-11-2011(W))  
For the appellant - David Morais; M/s David Morais  
For the 1st respondent - Benjamin John Dawson (Ooi Ai Yen with him);  
M/s Benjamin John Dawson  
For the 2nd & 3rd respondents - Hoi Jack S'ng; M/s Lee Hishammuddin Allen  
& Gledhill

- G (Civil Appeals No: 02-73-11-2011(W) & 02-74-11-2011(W))  
For the appellant - Benjamin John Dawson (Ooi Ai Yen with him);  
M/s Benjamin John Dawson  
For the 1st respondent - David Morais; M/s David Morais  
H For the 2nd & 3rd respondents - Hoi Jack S'ng; M/s Lee Hishammuddin Allen  
& Gledhill

*Reported by Suhainah Wahiduddin*

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**JUDGMENT**

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**Zaleha Zahari FCJ:**

**[1]** Public Bank Berhad (“the bank”) obtained leave on 9 November 2011 to appeal to the Federal Court against the whole of the decision of the Court of Appeal dated 13 September 2011 on the following questions of law:

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(a) Whether the statutory right of a chargee under the National Land Code to rely on his security to obtain full satisfaction of the indebtedness owed to him, is restricted by s. 8(2A) of the Bankruptcy Act 1967 where:

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(i) such security is provided by a company which is later wound up under the provisions of the Companies Act 1965; and

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(ii) the security was not realised within six months of the winding up order;

(b) Does s. 8(2A) of the Bankruptcy Act 1967 apply in a company liquidation situation where the secured creditor relies on his security for full satisfaction?

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**[2]** Pilecon Realty Sdn Bhd (“Pilecon Realty”) had also, on the same date, 9 November 2011, obtained leave to cross appeal to the Federal Court against part of the decision of the Court of Appeal dated 13 September 2011 on the following question of law:

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Whether a secured creditor is entitled to any interest in respect of its debts after the making of a winding up order if it does not realize its security within 6 months from the date of the winding up order.

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**[3]** The issue for determination in this case is, what is the interpretation to be given to s. 8(2A) of the Bankruptcy Act 1967 (subsequently referred to as “the BA”).

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**Background**

**[4]** The background facts are as follows: The bank granted a banking facility of RM20 million to Transbay Ventures Sdn Bhd (“Transbay”) upon terms as set out in a loan agreement dated 26 June 1998. The facility was secured by a charge over a piece of land ie, HS (D) 256676, PTB 20214, Bandar Johor Bahru,

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- A Negeri Johor Darul Takzim (“the said property”) belonging to Transbay *vide* Presentation No. 32284/98 Jilid 4296 Folio 31 dated 26 June 1998 (“the charge”) in favour of the bank. The terms of the charge provides that the prescribed interest “shall be payable until full settlement” (cls. 2 and 30).
- B [5] Transbay defaulted in repaying the said loan. The bank then instituted Kuala Lumpur High Court Suit No. D3-22-2239-2001 against Transbay to recover the sums then outstanding. Judgment was entered against Transbay on 22 August 2003.
- C [6] *Vide* High Court Johor Bahru Originating Summons No. MT2 24-493-2002 the bank, as chargee, obtained an order for sale of the said property to be sold by way of public auction on 7 October 2003.
- D [7] The bank had also, *vide* High Court Kuala Lumpur Winding Up Petition No. D7-28-13-2005, on 7 January 2005, applied to wind up Transbay. Transbay was wound up *vide* order dated 27 January 2006.
- E [8] Ooi Woon Chee (the 1st respondent) and one Gan Ah Tee were then appointed as liquidators of Transbay. Gan Ah Tee however resigned as a liquidator, which resignation was accepted by the court on 27 July 2007. Ong Hock An (the 3rd respondent) was then appointed in his place to act jointly and/or severally with
- F Ooi Woon Chee (jointly referred to as “the liquidators”).
- [9] The liquidators took steps to realise the only property of value of Transbay, ie, the said property. The said property was not sold by way of public auction pursuant to the order for sale dated 7 October 2003 but by way of a tender exercise. Arising from a tender exercise, BSEL Waterfront was the successful bidder of the said property. A sale and purchase agreement was then executed between the liquidators and BSEL Waterfront on 22 July 2008 (“the SPA”). Clause 6 of the SPA expressly provides that the proceeds of the sale of the said property would be utilised, for payment of the redemption sum to the bank, and the balance, for distribution to other creditors of Transbay pursuant to s. 292 of the Companies Act 1965 (“the Companies Act”).
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- I [10] The liquidators then requested the bank to furnish a statement of the redemption sum to enable the charge in favour of the bank to be discharged. The statement of account issued by the bank dated 31 December 2008 shows that the principal sum

outstanding was RM27,544,126.75, interest was RM14,003,907.71 whilst other fees and charges was RM809,507.13. The bank's position was that, as long as its security had not been realised, it was entitled to charge interest at the default rate as prescribed in the loan agreement. A

[11] Pilecon Realty is an unsecured creditor to whom Transbay was indebted in the sum of RM2,996,680.66. Besides Pilecon Realty, Transbay was indebted to Johor Coastal Development Sdn Bhd in the sum of RM29,077,149.97, and Pilecon Engineering Berhad, a sum of RM21,105,816.88. B C

[12] Pilecon Realty took the position that the bank was not entitled to interest subsequent to the date Transbay was wound up (ie, 27 January 2006). Pilecon Realty then, *vide* notice of motion dated 15 July 2009 (encl. (155)), applied for directions of the court and/or for the court to determine the proper basis of calculating interest on the capital sum owed to the creditors of Transbay, the date interest may be computed up to, and the amount Transbay has to pay the bank in respect of the debt owed. Pilecon Realty relied on ss. 40(3) and 43(6) of the BA to support their contention that the interest payable to the bank ceased to accrue after the date Transbay was wound up. D E

[13] The liquidators in turn, by notice of motion also dated 30 July 2009 (encl. (157)), pursuant to s. 237(3) of the Companies Act, sought the court's directions as to whether the bank was entitled to charge interest at the contractual rates on the amount owed by Transbay after the date of Transbay's winding up to the date of full payment. F

#### The High Court Judge's Decision G

[14] Enclosures (155) and (157) were heard together. On 7 September 2009, the High Court Judge's findings were as follows:

In respect of Enclosure 155, my ruling is that the interest is claimable, on the authorities cited, up to the date of the filing of winding up, if the Bank brings itself within the liquidation. So Enclosure 155 is allowed subject to that qualification. Each party to pay for its own costs. H

In respect of Enclosure 157, my finding is that the petitioner is outside the liquidation. The petitioner has not submitted its proof of debt to the liquidator. In *Re Hong Huat Realty (M) Sdn Bhd v.* I

- A     *United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd* [1987]  
2 MLJ 502, Shankar J at page 506 cited with approval a passage  
from Buckley on Insolvency that mere presentation of a petition  
does not bring the petitioner within a liquidation and by doing so  
the petitioner did not give up his security. Therefore the  
B     application in 157 is allowed.

### **The Court Of Appeal's Decision**

- C     [15] As earlier mentioned, before the High Court, Pilecon Realty  
relied on ss. 40(3) and 43(6) of the BA in support of their  
contention that the interest payable to the bank ceased to accrue  
after Transbay was wound up. Before the High Court, no reliance  
was placed on s. 8(2A) of the BA. Neither was 8(2A) of the BA  
mentioned in the original memorandum of appeal filed by Pilecon  
D     Realty. Pilecon Realty however amended their memorandum of  
appeal to include a new issue for determination of the Court of  
Appeal, whether s. 8(2A) of the BA read with s. 291 of the  
Companies Act was applicable in a company liquidation situation.

- E     [16] On 13 September 2011 the Court of Appeal allowed Pilecon  
Realty's appeal and the decision of the High Court Judge was set  
aside, each party to bear their own costs. The broad grounds of  
the Court of Appeal states as follows:

- F     Unanimous. Upon a true construction of s. 4(1) and (2) of the  
Civil Law Act 1956, s. 291(1) and (2) of the Companies Act  
1956; and s. 8(2A) of the Bankruptcy Act 1967, we are of the  
view that the computation of interest is for a maximum period of  
six months as stated in s. 8(2A). We are also of the view that  
s. 8(2A) applies to bankruptcy as well as company winding up.

- G     In the circumstances, we hold that the learned Judge of the High  
Court has erred in extending the interest beyond the six-month  
limit prescribed in s. 8(2A) ...

- H     [17] Leave to appeal against the decision of the Court of Appeal  
was granted by the Federal Court on the questions of law as  
earlier set out in this judgment.

### **The Appellant's Submissions**

- I     [18] En Dawson submitted that the rights of a secured creditor  
in the event of liquidation of a company is firstly, a proprietary  
right against the property over which security was taken.  
Secondly, a personal right against the company. Liquidation,  
according to him, does not interfere with the security rights of a

secured creditor. A person is said to claim in liquidation when he submits his proof of debt with intent to participate and receive dividends from the company. According to him s. 4(1) and (2) of the Civil Law Act only applies in respect of a claim in liquidation against the company.

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[19] En Dawson submitted that sub-s. (2A) inserted into s. 8 of the BA with effect from 17 January 1992 was not applicable to a winding up situation for the following reasons. He was of the view that s. 8(2A) had a social rehabilitative objective which was not applicable to the winding up of a company. The purpose for the insertion of sub-s. (2A) into s. 8 was to alleviate the burden and mitigate the full force of the law of insolvency on a bankrupt, by limiting the interest payable to the date of the receiving order and to remove the obligation to pay continuing interest.

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[20] The legislature did not intend s. 8(2A) of the BA to apply to a company liquidation situation by reason of the absence of a corresponding legislative intervention in the Companies Act affecting the rights of a secured creditor in a winding up situation.

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[21] There is no reason to encourage insolvent companies to continue to trade. Their existence pose a serious risk to the commercial community. Such companies must be promptly liquidated before they incur further liabilities to deter them from setting up a company, incurring liabilities and insulating themselves from any personal financial responsibility. According to him ss. 40(3) and 43(6) of the BA were also not applicable.

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[22] En Dawson submitted that s. 291(2) of the Companies Act, which incorporates the bankruptcy rules in relation to a claim against the company in liquidation in a proof of debt situation, has no application outside the ambit of s. 291(2). Such a creditor stands outside the liquidation. Section 291(2) of the Companies Act is expressly subject to s. 292, the provision dealing with priority in respect of unsecured debt. Section 291's reference to rights of secured and unsecured creditors, according to the appellant's counsel, refers to claims by them against the company in liquidation, not against the security. The bank's rights as a secured creditor are not impaired and the bank was accordingly entitled to rely on the charge to satisfy the interest accruing on the debt until full satisfaction.

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- A [23] The learned High Court Judge was, according to him, right  
in ruling that the bank relying on his security was outside the  
liquidation and entitled to the contractual interest. The Court of  
Appeal erred in ruling that s. 8(2A) of the BA applied to a  
company liquidation situation and in limiting the bank's entitlement  
B to interest to a maximum period of six months from the date  
Transbay was wound up.

**The Respondent/Cross Appellant's Submissions**

- C [24] In a normal situation the bank, as chargee, would be  
entitled to its secured debt and judgment interest. In this case  
however, by exerting pressure by winding up Transbay, the bank  
had submitted itself to the provisions of the Companies Act and  
the BA.
- D [25] Dato' David Morais the respondent's counsel, submitted that  
on the facts of this case the bank was only entitled to be paid  
the principal sum of RM13,860,089.29 and not entitled to any  
interest after Transbay was wound up (27 January 2006). The  
effective date for debts provable in bankruptcy is the date of the  
E receiving order (s. 40(3) of the BA). Once a receiving order was  
issued, no creditor may claim against the debtor's property except  
as directed by s. 8(1) of the BA.
- F [26] On s. 8 of the BA, his submissions was this. Section 8(1)  
was applicable to all secured and unsecured creditors, save that  
s. 8(2) expressly provides that secured creditors are exempted.  
Section 8(2A) however qualified that right of secured creditors by  
providing that, notwithstanding s. 8(2), a secured creditor is not  
entitled to interest if he does not realise his security within  
G six months. Parliament's intention in inserting sub-s. (2A) into  
s. 8, according to him, was to prevent secured creditors from  
taking unfair advantage of their security to the prejudice of the  
debtor or the unsecured creditors.
- H [27] He submitted that the rationale behind s. 8(2A) of the BA  
in a bankruptcy was equally applicable to a company winding up.  
What was being addressed by s. 8(2A) was the fact that a  
secured creditor would unfairly expand its share of the debtor's  
assets, thereby prejudicing the rights of both the debtor  
(shareholders) and their unsecured creditors. He submitted that it  
I would not be correct to discriminate against the unsecured  
creditors of persons and the unsecured creditors of a company. In

both situations, the unsecured creditors are at the mercy of a secured creditor who sits on his security, accruing interest, with increasing unfairness to unsecured creditors. This unfairness was present in both bankruptcy and winding up. It was accordingly important for s. 8(2A) to be construed to be applicable to companies winding up as well.

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[28] Section 8(2A) of the BA is applicable to a winding up situation pursuant to s. 4 of the Civil Law Act and/or s. 291(2) of the Companies Act. Section 4 of the Civil Law Act applies to winding up of companies. Section 291(2) of the Companies Act and s. 43(6) of the BA applies to an insolvent company. The combined effect of all of these provisions must be interpreted to mean that the cut off date for determination of interest of an insolvent company is the date of the order of winding up. *Majlis Amanah Ra'ayat v. The Official Receiver, Malaysia* [1984] 1 CLJ 76; [1984] 1 CLJ (Rep) 240; [1984] 1 MLJ 173 was cited as authority for this proposition.

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[29] The Court of Appeal's interpretation of s. 8(2A) that the bank was entitled to six months' interest was not in accord with the clear and plain meaning of the words used in the said section. Section 8(2A) states that "Notwithstanding sub-section (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order".

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[30] Any so-called security rights the bank relies on in order to claim against Transbay's property is expressly subject to s. 8(2A). Under s. 8(2A) read together with s. 8(1) and s. 8(2), regardless of his security, a secured creditor is not entitled to have priority over unsecured creditors in relation to any claim for interest if he fails to realise his security promptly.

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[31] This court was urged to dismiss the bank's appeals, and to allow Pilecon Realty's cross appeals.

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### Decision

[32] What is in issue in this case is, whether the amendment to s. 8 of the BA, the insertion of a new sub-s. (2A) with effect from 17 July 1992, is to be limited in its application to secured creditors in a bankruptcy situation or whether it is also applicable to secured creditors in a winding up situation?

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- A [33] Prior to the insertion of sub-s. (2A) into s. 8 of the BA, the position was this. Under s. 8(1) of the BA, when a receiving order is made against a debtor, the Director General of Insolvency becomes the receiver of the property of the debtor and thereafter, except as provided by the BA, no creditor to whom the debtor is
- B indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.
- C [34] An exception to this prohibition is provided in s. 8(2) of the BA. Secured creditors are allowed to realise or otherwise deal with their security as if s. 8 had not been passed.
- D [35] Paragraph 9 of sch. C to the BA (the rules which must be observed with respect to the mode of proving debts, pursuant to s. 42) states if a secured creditor realises his security, but there is still an outstanding amount due under the debt, he may prove for the balance due to him after deducting the net amount realised. The secured creditor will then participate in a share in the balance
- E of the assets of the debtor together with the unsecured creditors. The balance amount due to the secured creditor will rank *pari passu*, under s. 43(4) of the BA, with the debts proved by the unsecured creditors. Under the BA, payment of interest to the
- F secured creditors from the date of the receiving order has been removed by Act A1197, even if there is a surplus of assets after payment of the sums due on the date of the receiving order (s. 43(5) and s. 43(6) of the BA).
- G [36] Thus, prior to the insertion of sub-s. (2A) into s. 8 of the BA, a secured creditor who delays in realising his security and continues to charge interest on the amount due to him may cause unfairness to unsecured creditors. There is a possibility that the value of the security when realised would be insufficient to meet the repayment of the outstanding amount due and no balance left
- H over from the proceeds of realisation to go into the pool of assets to be shared by unsecured creditors. If the proceeds were insufficient to pay the amount due to the secured creditor and he participates in the balance of the debtor's assets, there will be more creditors sharing the pool of the remainder of the debtor's
- I assets. The net effect of this would be that the dividend payable

to each creditor would be smaller thus reducing the likelihood of the debtor's application for discharge later being favourably considered.

A

[37] If however a secured creditor acts promptly and realises the security upon which the receiving order was made, no further interest will be payable. The proceeds obtained upon the realisation of the property may be sufficient to meet the full amount due to the secured creditor, and the secured creditor will have no need to prove for the balance of the amount due to him. Should the proceeds be insufficient to meet the full amount due to the secured creditor, the balance amount may be small enough so as not to substantially affect the shares of the unsecured creditors in the remaining assets of the debtor, should the secured creditor choose to prove for the balance due to him.

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[38] When the legislature amended the BA to include sub-s. (2A) into s. 8, it was fully aware of the effect of the provisions of the law that was then in force. Based on the pre-amended provisions Malaysian courts had consistently taken the view that a secured creditor who choose not to prove in the bankruptcy of the debtor should not be deprived of the interest which the contract allows.

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[39] The legislature clearly was fully cognizant of the effect of the provisions of the prevailing laws prior to the insertion of sub-s. (2A) into s. 8 and had deliberately set out to change the law. The legislature however had not deemed it fit to change the other referral and related provisions as submitted by the appellant's counsel.

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[40] In our considered opinion the mischief and rationale for the insertion of sub-s. (2A) into s. 8 of the BA, as evident from the explanation given by the Minister in moving the amendments to the BA for its second reading in the Dewan Rakyat on 14 May 1992, was, by reason of the law as it then stood, enabled some secured creditors to take an inordinately long time to realise the property resulting in the debtor having to continue to bear interest until the sale is completed. This was to be considered to be unfair to unsecured creditors and to the debtors. The speech of the Honourable Minister in moving the amendment to the BA in respect of s. 8 was as follows:

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... Seterusnya pindaan adalah juga dicadangkan dibuat kepada Seksyen 8 bagi memperuntukkan bahawa tiada apa-apa bunga boleh dibayar kepada pemiutang bercagar jika sekiranya pemiutang

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- A       tersebut gagal menghasilkan cagarannya dalam tempoh 6 bulan dari tarikh perintah penerimaan dibuat. Rasionalnya ialah pada amalan biasa dan berdasarkan peruntukan yang sedia ada, didapati segolongan pemiutang bercagar mengambil masa yang terlalu lama untuk menghasilkan harta tersebut. Manakala bunga yang perlu dibayar oleh penghutang berterusan sehinggalah jualan dilaksanakan.
- B       Perbuatan sedemikian adalah tidak adil kepada pemiutang yang tidak bercagar dan juga kepada penghutang.

C       **[41]** Thus, although a secured creditor under s. 8(2) of the BA was free to deal with his security, with the insertion of the sub-s. (2A) into s. 8, the chargee must realise their security promptly within six months of the receiving order failing which the chargee cannot claim any interest.

- D       **[42]** Decisions of the courts prior to sub-s. (2A) being introduced into s. 8 of the BA, or does not involve any issue arising from s. 8(2A), would accordingly be of little, if any, assistance to us, in making a considered decision in this case. The duty of the courts is to make a construction to cure the mischief and advance the remedy. It is not our duty either to add or to take away the meaning of the words of a statute unless there are good reasons for thinking that the legislature had intended to limit its operation.
- E

- F       **[43]** For the courts to limit the application of a certain provision when the legislature had failed to express such an intention would be to usurp the functions of the legislature which is not within the competence of the courts to do. The duty of the courts is to give full effect to the language of the law. The function of the courts is to construe the language of the referral and related provisions as they stand, to give effect to the purpose of enacting the provision, and the mischief which existed which the legislature sought to eliminate.
- G

H       **[44]** Section 4(1) and (2) of the Civil Law Act 1956 is the provision relating to the administration of insolvent estates and winding up of companies. It provides as follows:

- H       4. Administration of insolvent estates, and winding up of companies.

- I       (1) In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up,

the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt.

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(2) All persons who, in any such case, would be entitled to prove for and receive dividends, out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of the estate, or under the winding up of the company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

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[45] The provisions of the BA in relation to the debts of a bankrupt are clearly applicable to an insolvent company by virtue of ss. 291(1) and 291(2) of the Companies Act. It provides as follows:

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Subdivision (2) - Proof and Ranking of Claims

291. Proof of debts

E

(1) In every winding up, subject in the case of insolvent companies to the application in accordance with this Act of the law relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.

F

(2) Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

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A [46] Section 8, and in particular, sub-s. (2A) of the BA, are clear  
and unambiguous. In the absence of an express provision limiting  
its application, there is no reason to limit its application only  
against a bankrupt and not to a wound up debtor. We are in  
agreement with the Court of Appeal that upon a true construction  
B of s. 4(1) and (2) of the Civil Law Act 1956, s. 291(1) and (2)  
of the Companies Act, s. 8(2A) of the BA is equally applicable to  
a secured creditor in relation to a winding up situation.

C [47] The answers to Questions 1 and 2 posed by the appellant  
are therefore in the affirmative.

D [48] On the issue of a secured creditor's right to interest being  
limited up to a period of only six months as found by the Court  
of Appeal, the facts of this case show that the bank had filed the  
civil suit against Transbay in 2001, obtained judgment on  
22 August 2003; filed a foreclosure action of the charged property  
way back in 2002 and obtained an order for sale on 7 October  
2003; filed an application to wind up Transbay in 2005 and  
obtained a winding up order on 27 January 2006. The bank  
however only managed to sell the said property by way of a  
tender exercise on 22 July 2008.

F [49] Based on our reading of s. 8(2A), a secured creditor is given  
a timeline of six months to sell the charged property failing which  
they are not entitled to interest. Since the charged property was  
realised some two years six months after the winding up of  
Transbay, the bank had failed to meet the statutory limit of  
six months under s. 8(2A) of the BA. As such the bank should  
not be entitled to any interest. The Court of Appeal had therefore  
erred in allowing interest for period a six months.

G [50] The question posed by Pilecon Realty is thus answered in  
the negative.

H [51] For the above reasons the bank's appeals are dismissed and  
Pilecon Realty cross appeals are allowed with costs.

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